

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

CHAMBER SUMMONS NO. 452 OF 2005

IN

SUIT NO. 76 OF 2005

M/s. Rizvi Builders.... .. Plaintiffs.

Versus

Goswami Shrimad Gokulnathji  
Mehtaraj Hindu Undivided Family  
and Others. .... Respondents.

A N D

Harikishan R. Bhattad & Ors. .. Applicants.

Mr. N. V. Walawalkar i/by M/s.Vimadalal & Co.,  
for the Applicants.

Mr. S. B. Prabhavalkar for the Plaintiffs.

Mr. Khatri i/by M/s. Pravin Mehta & Mithi  
for Defendant Nos.2 to 29, 31 to 34, 45,  
49, 53 and 56.

**CORAM : A. M. KHANWILKAR, J.**

**DATED : JULY 26, 2005.**

**P.C.:**

Heard learned Counsel for the parties. Perused  
the pleadings and the documents on record.

2. Although the Applicants are seeking different reliefs in this application, during the course of argument the Applicants have confined to the main relief in terms of prayer clause (b) for joining them as party Defendant Nos.58, 59 and 60 to the pending suit instituted by the Plaintiffs, which suit it is stated to be still pending in so far as against Defendant Nos.1, 30, 35 to 44 and 48 respectively. This suit as filed by the Plaintiffs is essentially for specific performance of the agreement entered into between the Plaintiffs and the Defendants.

3. The Applicants, who are third party, have approached this Court on the assertion that the Plaintiffs had full notice of the fact that the Applicants had already entered into agreement in respect of the portion of the property which was originally owned by the Trust pursuant to the Agreement executed in favour of the Applicants on 9th September, 1989. The fact that the Plaintiffs had notice of the said position is reflected in the recital to the agreement entered into between the Plaintiffs and Defendants at page 71 of the Plaint paperbook. The Agreement executed between the Plaintiffs and the Defendants is placed on record. In

recital clause (v)(1) of the agreement at page 97, it clearly refers to the agreement executed in favour of the Applicant dated 9th September, 1989 by Shrimad Goswami Gokulnath Maharaj, HUF, through its Karta and Manager Shri Nrityagopalji Krishnajivanji. In sub-clause (2) of the same agreement at page 98, it is stated that in terms of the said agreement (executed in favour of the applicants) Rs.10 lakhs was paid to the owner (Trust) upon handing over possession to Hari Constructions under letter dated 12th September, 1989. The letter of possession has been placed on record at page 96, Exhibit No.5 to the Chamber Summons, which confirms and acknowledges the position that the possession of the property bearing Survey No.91/1 and 2 and Survey No.93 situated at Poisar, S. V. Road, Taluka Borivli, admeasuring 34,475.63 sq.mtrs. has been handed over to the Applicants. The Applicants are also relying upon the documents to support the position that they are put in possession of the property which is portion of the suit property bearing Survey No. 91/1 & 2 and Survey No. 93 to the extent of the area admeasuring 34,475.63 sq. mtrs. Be that as it may, clause 1 of the agreement executed between the Plaintiffs and the Defendants at page 101 of the plaint paperbook, reads thus:

"1. It is agreed and declared that the recitals contained above shall constitute also as an operative part of this agreement as if the same were specifically set out herein and incorporated verbatim."

According to the Applicants, as the Plaintiffs had full notice of the fact that the Applicants are already put in possession of the portion of the suit property, which position is incorporated in the Agreement executed between the Plaintiffs and the Defendants, it was necessary in the interest of justice to implead the Applicants as party Defendants to the suit for full, complete and effectual adjudication of all issues arising from and under the suit agreement, especially with reference to the reliefs claimed by the Plaintiffs which includes the decree ordering Defendant No.1 to put the Plaintiffs into possession of the suit property. Reliance is placed on the decision of our High Court reported in **AIR(30) 1943 Bombay 27 (Shivshankareppa Mahadevappa Parakanhatti v/s Shivappa Parappa Kupati and others)**. Reliance is also placed on the decision of the Gujarat High Court reported in **AIR 1971 GUJARAT 256 (Bai**

**Devkabai and others v/s Shah Shamji Mulji).** Both these decisions are pressed into service to contend that person in possession and third party in possession of the property and when any adverse relief is claimed against the Vendor, in such a suit although the person is a third party would be a necessary party in such a suit. Reliance is also placed on Section 3 of the Transfer of Property Act, which defines explanation of "a person said to have notice" of a fact when he actually knows that fact or when, but for wilful abstention from an enquiry or search which he ought to have made, or gross negligence, he would have known it. Reliance is placed on explanation II to the said definition which stipulates that any person acquiring any immovable property or any share or interest in any such property shall be deemed to have notice of the title, if any, of any person who is for the time being in actual possession thereof. Reliance is also placed on Section 53A of the Transfer of Property Act to contend that in terms of Agreement between the Applicants and the original Owner, who incidentally happens to be party to the suit agreement which is in favour of the Plaintiffs, the Applicants have been put in possession of the portion of the suit property and therefore have acquired right under

Section 53A of the Transfer of Property Act which cannot be interfered with. It is, therefore, contended that the Applicants even if are not necessary party would be proper party to the pending suit between the Plaintiffs and Defendants and therefore in such a suit it would be necessary to implead the Applicants as party Defendants for full, complete and effectual adjudication of all issues arising from and under the suit agreement. In such a case, even if the Plaintiffs are unwilling to implead the Applicants as party Defendants the Court would oblige the Applicants by directing the Plaintiffs to implead the Applicants as party Defendants to the suit.

4. Counsel for the Plaintiffs resisted this application essentially on the argument that even if the Agreement dated 9th September, 1989 is read as a whole it does not even remotely suggest that the Applicants were put in possession of any portion of the disputed property. If it is so, the argument of the Applicants being founded on the factum of possession of the property will have to be rejected. For this reason it will have to be held that the Applicants are not necessary nor proper party to the

suit. According to the Plaintiffs, reliance placed by the Counsel on the decision of this Court or for that matter of the Gujarat High Court is inappropriate. He submits that in case of Shivshankareppa Mahadevappa Parakanhatti (**supra**) the Plaintiffs had impleaded the third party in the suit. In that case the Court was not called upon to answer the question whether the Plaintiff can be forced to implead third party as party defendant to the suit. According to the learned Counsel for the Plaintiffs, if the Applicant has any relief either against Defendant No.1 or against the Plaintiffs, they may seek appropriate relief but cannot insist for being impleaded in the suit as filed by the Plaintiffs for the nature of the relief claimed in the suit for specific performance of the suit agreement. Counsel for the Plaintiffs then contended that this Court had also occasion to consider whether Defendant No.1 was authorised to execute any agreement or deal with the property and that question has been answered in the negative. If it is so, as the Applicants are claiming right through the Defendant No.1, they have no claim over the suit property and for which reason are not necessary party to the present proceedings. It was then contended that the Applicants have conceded in the sur-rejoinder filed

before this Court that the Agreement executed in favour dated 9th September, 1989 has been terminated. On the above submission, it was contended that the application ought to be rejected.

5. Having considered the rival submissions, in my opinion, there is substance in the arguments canvassed on behalf of the Applicants. The Plaintiffs in the suit Agreement have conceded the position that they had notice about the fact that the Applicants are in possession of portion of the suit property. That is reflected from the recital of the suit Agreement. The fact that Agreement was executed in favour of the Applicants by the Defendant No.1 on 9th September, 1989 has not been disputed. The only controversy raised before this Court by the Plaintiffs was that the Applicants were not in possession of any portion of the disputed property. This submission, prima facie, does not commend to me. Whereas, the stand taken by the Applicants is supported by the documents on record that possession was made over to the Applicants in respect of the portion of the suit property which was intended to be transferred in favour of the Applicants by Defendant No.1. The arguments of the Plaintiffs that the possession letter

does not make reference to payment of Rs.10 lakhs, which was the condition under the Agreement dated 9th September, 1989 also does not commend to me. Merely because possession letter does not make reference to the payment of Rs.10 lakhs that cannot be the basis to discard the stand of the Applicants. Besides as mentioned earlier, the suit agreement clearly refers to the position that the Applicants are in possession of portion of the suit property. In this background, it is too late in the day for the Plaintiffs to contend that the Applicants were not put in possession of portion of the suit property as claimed by them. There is nothing on record to suggest as to in what manner the possession of the Applicants on that portion of the property has been reverted back to the Defendant No.1 who in turn would legitimately put Plaintiffs into possession of the entire property, which is the relief claimed in the suit. The argument of the Plaintiffs that the suit agreement clearly proceeds on the understanding that the property is being purchased on "As Is Where Is" basis can not, by itself, be the reason to deny the relief claimed in the present Chamber Summons of directing the Plaintiffs to implead the Applicants as Defendants in the suit. That relief in my opinion will have to be

granted for the reasons already mentioned earlier. In the circumstances, the Applicants will have to be impleaded in the suit as the Defendants, who in turn would be entitled to file pleadings and resist the claim of the Plaintiffs as may be permissible in law. At that stage all questions will have to be considered including the issue involved whether the Applicants are in possession as claimed by them.

6. The arguments canvassed on behalf of the Plaintiffs that the decision of this Court in the case of Shivshankareppa (**supra**) or for that matter the decision of the Gujarat High Court in the case of Devkabai (**supra**) are of no avail to the Applicants does not commend to me. Even in the case of Shivshankareppa (**supra**) this Court has clearly observed that the general rule is that in a suit for specific performance a stranger to the contract cannot be sued upon or the Plaintiffs be forced to implead him as a party Defendant in the suit. However, the judgment proceeds to observe that general rule is subject to certain modifications. One of the criteria for modified application of general rule is that, in a case it is desirable to avoid multicplity of proceedings, that can be the basis to relax the

condition. In the present suit, as observed earlier, the presence of the Applicants would be necessary for the full, complete and effectual adjudication of all the issues arising from and under the suit agreement. In such a case, in my opinion, it would be appropriate that the Plaintiffs are directed to implead the Applicants as party Defendants to this suit. It will be useful to refer to the decision of the Apex Court which has accepted this legal position, namely, the decision in 1992(2) SCC 524 (Ramesh Hirachand Kundanmal v/s Municipal Corporation of Greater Bombay and Others) and 1959 SCR 1111 (Razia Begum v/s Sahebzadi Anwar Begum & others). Recently, I had occasion to consider similar aspect in the case of Vatanakurussi v/s Kvaerner Powergas India Limited decided on June 14, 2005 being Chamber Summons No. 63 of 2005. Even in the present case the Applicants, if made parties would be bound by the result of the action and the question to be settled cannot be effectually and completely settled unless they are made parties, for the Applicants are directly or legally interested in the action atleast if the relief of possession as prayed for by the Plaintiffs is granted.

7. Taking over all view of the matter, in the interest of justice, in my view, it would be appropriate to allow the Chamber Summons in terms of prayer clauses (a) and (b). In so far as the other reliefs are concerned, the same are not pressed with liberty to the Applicants to take recourse to such other remedy as may be permissible by law. Order accordingly. Amendments to be carried out within three weeks from today.

8. To enable the Applicants to take recourse to appropriate remedy for seeking relief in terms of prayer clause (c) or any such relief permissible by law, the parties are directed to maintain status quo as of today with regard to the property purportedly in possession of the Applicants under Agreement dated 9th September, 1989 for a period of four weeks from today. Order accordingly.

9. It is made clear that I am not expressing any opinion with regard to the correctness or otherwise of the Consent Decree / Consent Order passed between the Plaintiffs and some of the Defendants and the effect thereof. All these aspects are left open to be decided on its own merits.

10. Learned Counsel for the Plaintiffs seeks stay of the operation of this order as the Plaintiffs intend to take up the matter in appeal. The direction issued against the Plaintiffs to carry out amendment within two weeks is stayed for a period of four weeks from today.

11. No order as to costs.

Sd/-

(A. M. KHANWILKAR, J.)